We submit that the same defect is here present. Here, the court below held, contrary to Section 7 of Taft-Hartley, that it is proper for an employer to discharge an employee for union activity. As pointed out above the Federal Circuit Courts have held that the fact the employee is a Communist is no ground for disregarding the provisions of Taft-Hartley.

CONCLUSION.

The decision below is erroneous because it was decided in a way probably not in accord with applicable decisions of this Court; it presents a federal question of substance not heretofore determined by this Court, and it conflicts with authoritative Federal Court desions.

The Petition for the Writ of Certiorari should be granted.

Dated, August 12, 1955.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 92

MABEL BLACK and T. Y. WULFF, etc.,
Petitioners,
vs.
CUTTER LABORATORIES (a corporation).

BRIEF AMICI CURIAE OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND OF THE CIO-CALIFORNIA INDUSTRIAL UNION COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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This brief *amici curiae* is filed with consent of all parties pursuant to Rule 42(1) of this Court.

INTEREST OF AMICI CURIAE.

The Congress of Industrial Organizations and the CIO-California Industrial Union Council view with concern the decision of the court below. The CIO's position on Communist and Communism is well

known and need not be labored. Indeed, as the lower court pointed out, the very union with which petitioner in this case was affiliated, was expelled from the CIO because of Communist domination.

This brief is not filed, therefore, because the CIO is a partisan of the petitioner. The contrary is in fact true.

This brief is being filed because we believe that there are issues of law presented in this case which are of interest to all labor organizations and the employees they represent. Indeed, in this case, we believe there are issues which are of interest to employers as well. And we believe that the decision of the court has resolved those issues in a manner harmful not only to labor but also to management; in short, in a manner harmful to the cause of good labor-management relations.

It is to one of these questions that this brief is addressed. We are not partisans in the case. We have no interest as to whether Mrs. Walker gets her job back or not. We are interested that this Court corect what we believe to be an erroneous and harmful decision in law.

ARGUMENT.

Amici confine their argument to that phase of the case, Point 8 (p. 32) of the Petition for Writ of Certiorari, which to it seems to violate the national labor law and policy.

Simply stated, the case is this: the company is engaged in interstate commerce but not in defense work

within the meaning of the Industrial Employment Security program; it discharged Mrs. Walker because of union activities; an arbitration award ordered the company to reinstate her because the discharge violated the contract between the union and the company; the court below held that the company need not reinstate Mrs. Walker because she is a Communist. So viewed, the decision below violates the national law and policy protecting the right to self-organization and collective bargaining.

The question of complete preemption[1] is not present here as it may well be in the security phase of this case (See point 7, pp. 30-31 of Petition). But the question is present here as to whether state action, albeit through courts (see *Shelley v. Kraemer*, 334 U.S. 1, and *Barrows v. Jackson*, 346 U.S. 249), in the field of interstate commerce, contrary to and inconsistent with the national labor law, can be permitted to stand. We think it cannot and that this Court should grant review to correct the error.

Section 7 of the Taft-Hartley Act, 29 USC 157, sets forth the national policy that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of col-

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[1]Cf. *Weber v. Anheuser-Busch, Inc.*, 75 Sup. Ct. 480; *Garner v. Teamsters, etc. Union*, 346 U.S. 485; *Plankinton Packing Co. v. Wisconsin Employment Bureau*, 338 U.S. 953; *Building Trades Council v. Kinard Construction Co.*, 346 U.S. 933; *Capitol Services, Inc. v. NLRB*, 347 U.S. 501; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18; *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U.S. 767.

lective bargaining or other mutual aid or protection." 29 USC 158(a)(3) makes it an unfair labor practice to discriminate against an employee because of his union activity.

Citations are superfluous to demonstrate that to discharge an employee because of his union activities is a violation of the above two mentioned sections. Moreover, the Labor-Management Relations Act has been authoritatively construed to mean that even if an employer has a bona-fide ground for discharge, if the real reason for the discharge is that of union activities, the Act is nevertheless violated.[2]

In *N.L.R.B. v. L. Ronney and Sons Furn. Mfg. Co.*, 206 F. 2d 730 (CA 9, 1953), cert. den. 346 U.S. 730, reh. den. 347 U.S. 914, the employer claimed that the reason he did not rehire the charging employees was because they were inefficient. The Board found that conceding the employees were inefficient, this was not the ground for discharge. On petition for enforcement, the Court of Appeals held (206 F. 2d at 737):

> "* * * It is well settled that an employer violates §8(a)(3) by discharging or refusing to rein-

[2]We do not wish to be understood as suggesting that being a Communist is sufficient ground for an employer in private industry to discharge an employee. Indeed, we feel, both from the standpoint of the effective and intelligent combatting of Communism and from the standpoint of public expense, that there is and should be no such principle. (See *Consolidated Western Steel Co.*, 13 LA 721; *J. H. Day Co., Inc.*, 22 LA 751; *NLRB v. Pratt, Read & Co.*, 191 F. 2d 1006 (CA 2 1951); *NLRB v. Fulton Bag and Cotton Mills*, 180 F. 2d 68 (CA 10 1950); Cf. *ACA v. Douds*, 339 U.S. 382, 404.) What we are saying is that assuming, *arguendo*, that being a Communist is ground for discharge, where, as here, that fact is not the real reason for the discharge, but, instead, the reason for discharge is for union activities, the national labor law has been violated, and such a judgment should be corrected.

state an inefficient employee if the employer's reason for so doing is not the employee's inefficiency but his union affiliation or activity (citations). The critical question is the employer's *true motive.* As the court said in the Electric City case, *supra,* 178 F. 2d at page 983, '* * * it matters not that for reason apart from union activity an employee deserves summary discharge if as a fact the reason was union activity.' "

Accord:

N.L.R.B. v. Beaver Meadow Creamery, 215 F. 2d 247, 251 (CA 3, 1953).

In *N. L. R. B. v. Coal Creek Coal Co.,* 204 F. 2d 579, 583 (C.A. 10, 1953), the court said:

". . . it is certain that an employer having a right to discharge employees for an unprotected activity may not discharge them for a discriminatory reason without violating Section 8(a)(3) of the Act."

In *N. L. R. B. v. Jamestown Sterling Corp.,* 211 F. 2d 725, 726 (C.A. 2, 1954), the court said:

". . . If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation of the National Labor Relations Act, 29 U.S.C.A., § 151 *et seq.* . . ."

Accord:

N. L. R. B. v. Whitin Machine Works, 204 F. 2d 883, 885 (C.A. 1, 1953):

"In order to supply a basis for inferring discrimination, it is necessary to show that one rea-

son for the discharge is that the employee was engaging in protected activity. It need not be the only reason but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist." (Citing cases.)

In *N. L. R. B. v. Columbia Products Corp.*, 141 F. 2d 687, 688 (C.C.A. 2, 1944), the court framed the question as follows:

> "This case involves a simple question: Whether the company discharged a woman employee, named Ferrara, because she was insubordinate, *as concededly she was;* or because she was obnoxious to it as a persistent union organizer." (Italics added.)

And in *Wells v. N. L. R. B.*, 162 F. 2d 457, 459, 460 (C.C.A. 9, 1947), the court said:

> ". . . The prohibition of § 8(3) by its plain terms, extends to any discriminatory discharge the purpose and manifest effect of which is to discourage employee membership in a labor organization. The existence of some justifiable ground for discharge is no defense if it was not the moving cause." (Citing cases.)

The decisions by this Court make it clear that the decision of the court below, being contrary to the national law protecting against discharge for union activity, cannot be permitted to stand. In *Hill v. Florida*, 325 U.S. 538, *International Union v. O'Brien*, 339 U.S. 454 and *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, this court held invalid, state action found to be violative of the national Act.

In the *Hill* case, 325 U.S. at 542, this Court approved the holding by the National Labor Relations Board that "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments'," and the court said (325 U.S. at 543) that its holding was "that the National Labor Relations Act and §§ 4 and 6 of the Florida Act *as here applied* cannot 'move freely within the orbit of their respective purposes without infringing upon one another'." (Italics added.)

In the *O'Brien* case, the Court said (339 U.S. at 458) that

> "Even if some state legislation in this area (regulation of strikes) could be sustained, the particular statute before us could not stand. For it conflicts with the federal Act . . ."

And (339 U.S. at 459) that:

> ". . . (I)f 'Congress has protected the union conduct which the state has forbidden . . . the state legislation must yield'."

Congress has not said that it is illegal to discharge employees for union activities *except* Communists. On the contrary, the National Act, as authoritatively construed provides that precisely the opposite is the case.[3]

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[3]Cf. also *American Communications Association v. Douds*, 339 U.S. 382, 404, 408, holding that even the oath provisions of Section 9(h) of the Taft-Hartley Act (29 USC 159(h)) do not inhibit the right of Communists to be employed or to hold union office, but only the right of a union to resort to the National Labor Relations Board's processes if its officers do not sign the oath. And see also

The Federal Courts which have had to deal with discharges for union activities under the National Labor Relations Act have not been spared the argument that the Act does not apply as to Communists.

In *N. L. R. B. v. Pratt, Read & Co.*, 191 F. 2d 1006 (C.A. 2, 1951), the employees adhered to a CIO union which had not filed the non-Communist affidavits required under the Taft-Hartley Act. They were discharged, the company claiming it was because of their incapacity or inadequacy as employees. The Board ordered reinstatement and the matter was presented for enforcement to the Court of Appeals. Head note 3 (191 F. 2d at 1007), which is borne out by the body of the case, states:

> "Employees' adherence to a union which had not filed non-communist affidavits was insufficient ground for their discharge, and discharge for such reason was a violation of rights of employees under National Labor Relations Act, and employees were entitled to reinstatement with back pay. . . ."

N. L. R. B. v. Fulton Bag and Cotton Mills, 180 F. 2d 68 (C.A. 10, 1950), involved this situation:

The company contended that the unfair labor practice charge which had been filed on behalf of a discharged employee had not been filed in good faith or in the interest of the employee but to "effectuate the objectives and designs of the Communist Party."

Farmer v. International Fur etc. Workers, ... F. 2d ...., 35 LRRM 2488 (CA DC 1955), and *Farmer v. United Electrical, etc. Workers*, 211 F. 2d 36 (CA DC 1953), cert. den. 347 U.S. 942, holding that the Board's processes cannot be withheld even though the oath filed is false; that the sanction for such misconduct is criminal prosecution.

Prior to the hearing the company had asked for subpoenas to prove that the person who had filed the unfair labor practice charge and the employee were members of the Communist Party. The subpoenas were refused. At the hearing the company made an offer of proof to the same effect. The offer of proof was refused. On the petition for enforcement the court held (180 F. 2d at 71):

> "Even though Levin may have been a member of the Communist Party, and even though his purpose in lodging the charge with the Board was to further the objects and designs of the Communist Party those facts did not affect the jurisdiction of the Board. The Act requires a charge before the Board may issue a complaint . . . And when the Board issues its complaint, the sole question is the truth of the accusation of unfair labor practices contained in it."[4]

When Congress intended disabilities because of Communist Party membership, it knew how to, and did, say so. (29 U.S.C. 159(h); *A.C.A. v. Douds*, 339 U.S. 382.)

In the *Amalgamated Association* case, this Court held (340 U.S. at 398) that the Wisconsin Act before the court (regulating strikes in public utilities)

> "has forbidden the exercise of rights protected by § 7 of the Federal Act."

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[4]The case also involved the situation that the employee had lied as to his reasons for wanting to be off work. As to this the court held the company was not warranted in laying the employee off and refusing to reinstate him "if the actual reason for the lay off and refusal to reinstate was his membership and activities in the union and his participation in the proceedings pending before the Board." *(Ibid.)*